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Bryn M. Taylor P55668
Name of Attorney Registration No.
Signature of Attorney

Image

AR/1761

P&G Case 8491

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In the application of :
DAVID K. YANG et al. : Confirmation No. 3463
Serial No. 09/821,376 : Group Art Unit: 1761
Filed: March 29, 2001 : Examiner: Curtis E. Sherrer
For LOW GLYCEMIC RESPONSE COMPOSITIONS

REQUEST TO REINSTATE APPEAL UNDER 37 CFR § 1.193(b)(2)(ii)

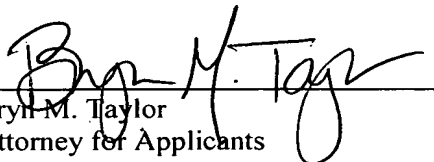
Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Applicants herein request that the Appeal of this case be reinstated. On December 17, 2003, The Examiner mailed an Official Action reopening prosecution of the Claims on Appeal. A Supplemental Appeal Brief is submitted, in triplicate, herewith.

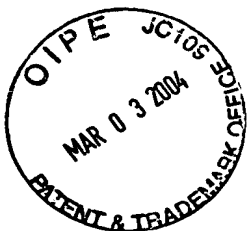
It is believed that no additional fees are due. But the Commissioner is hereby authorized to charge any necessary fee under 37 CFR §1.17, and any other necessary fees to Deposit Account No. 16-2480 in the name of The Procter & Gamble Company, Patent Division. An additional copy of this Notice is enclosed for that purpose.

Respectfully submitted,

By 
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Date: February 26, 2003

Customer No. 27752



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Bryn M. Taylor	P55668
Name of Attorney	Registration No.
<i>Bryn M. Taylor</i>	
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For LOW GLYCEMIC RESPONSE COMPOSITIONS

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APPELLANT'S SUPPLEMENTAL BRIEF

Mail Stop Appeal Brief - Patents

Commissioner for Patents

P. O. Box 1450

Alexandria, VA 22313-1450

Dear Sir:

On July 18, 2003 the Appellants appealed to the Board of Appeals the decision of the Examiner dated May 14, 2003 in which Claims 1-6, 8-11, 13-18 and 20 were rejected for a third time. On September 18, 2003, a Brief was filed in support of that Appeal. On December 17, 2003, the Examiner mailed a Final Office Action in response to Appellants' Appeal Brief. Submitted herewith is a request under 37 CFR § 1.193(b)(2)(ii) to reinstate the present Appeal. This Supplemental Brief is submitted in support of that request. This Brief is being filed in triplicate.

NEW ISSUES

The Examiner states that the purpose of reopening prosecution is to "more clearly define the rejections." However, upon comparing the most recent office action, dated December 17, 2003, to the previous office action, dated May 14, 2003, Appellants are unable to see how the rejections have been "more clearly defined." While the Examiner has briefly expanded on the rejections, the substance of the rejections remains the same.

Specifically, in rejecting the claims under 35 U.S.C. §112, the Examiner restates the prior rejection, adding that "if the (Glycemic Index [GI] value) ranges are indeed critical, then applicant must inform the public as to the scope of the instant invention with respect to these ranges." See Final Action, pg.3, para.1. Appellants respectfully assert that at no time were the claimed ranges deemed "critical." However, these ranges do allow for the surprising benefits taught in the present application. Moreover, for the reasons stated in the Appeal Brief, and reproduced herein,

Appellants assert that they have indeed informed those skilled in the art of the scope of the ranges claimed herein.

Similarly, in rejecting the claims under 35 U.S.C. § 103, the Examiner again restates the prior rejection, adding that “the claims are not restricted to GI levels of specifically 55 or less, or a fructose level of 10% or less, because these ranges are modified by the use of the term “about,” and therefore the claimed product could have some unknown higher value than those relied on in Applicants’ arguments.” In response, Appellants respectfully assert that, as further explained herein, the use of the term “about” in the present Claims is sufficiently clear to allow one skilled in the art to understand the limits thereof.

Therefore, Appellants believe that the foregoing rejections are simply expanded versions of the Examiner’s previous rejections of the claims. As such, these rejections do not more clearly define the rejections.

Additionally, the Examiner has responded to Appellants’ arguments under 35 U.S.C. §103 that are set forth in the Appeal Brief. A discussion of each follows.

First, the Examiner states that if the Appellants’ use of the term ‘synergy’ is indicative of unexpected results, then the argument must be couched as such. In a sincere effort to simplify the issues on appeal and advance the prosecution of the case, Appellants have herein removed the ‘synergy’ language from the present arguments. However, the removal of this term should not be interpreted to limit the benefits of the present invention to only expected results. Thus, it is respectfully asserted that this rejection should be overturned.

Second, the Examiner asserts that Genus-Species arguments apply only to chemical compounds and thus, Appellants’ invention is not covered by this theory. Moreover, the Examiner states that in many respects, the cited art is narrower than the present composition. Appellants respectfully traverse both of these arguments. Genus-Species arguments are useful in making determinations involving chemical compositions. Appellants respectfully assert that the ingredients of the present invention, e.g. water, sweetener, flavanols, vitamins and the like, are all chemical compositions. Therefore, the present invention consists of a combination of several chemical compositions, which have been formulated into a drinkable beverage. Thus, the Genus-Species argument reproduced herein is applicable to the present case.

Moreover, the Examiner’s contention that the cited art is, in many respects, narrower than the present composition, is unfounded. While the cited art simply lists various ingredients, without regard to amounts of ingredients included, or characteristics of the final composition, the present invention, in contrast, not only lists ingredients, but additionally limits the amount of those ingredients by claiming characteristics of the final compositions, namely Glycemic Index

value and total fructose content. For these reason, Appellants respectfully assert that the Genus-Species analogy is applicable to the present case.

Third, the Examiner states that because the cited art “inherently possesses the claimed Glycemic Index of about 55, the cited art also possesses the claimed characteristics” of perceived positive mood and energy. Appellants respectfully assert that, as argued previously and reproduced below, there is no teaching in the art that establishes that the compositions disclosed therein *inherently* have a Glycemic Index comparable to the present invention. As discussed below, the fact that the art shares some common ingredients with the present composition does not, in and of itself, mean that the two compositions must also share the same Glycemic Index. Thus, it is asserted that the cited art does not possess the same benefits as the present composition.

Fourth, the Examiner states that because the cited art product is called “Cinagro Energy Plus Whole Body Tonic,” the cited art teaches a kit. Appellants respectfully assert that merely giving a product a name is insufficient to qualify that product as a kit. In the present application, the kit consists of a health beverage composition and instructions that use of the composition provides several benefits. In contrast, Product Alert is simply a list of ingredients. Having the word “energy” in the name of the product does not make the product a ‘kit’ as it is understood in the art. Therefore, Appellants respectfully assert that Product Alert does not teach a kit.

Finally, in regards to the Examiner’s contention that Appellants have not addressed the rejection under 35 U.S.C. § 103 based on Appellants’ own alleged admissions, Appellants respectfully assert that these alleged admissions have indeed been previously addressed. However, in an effort to further prosecution of this matter and clarify Appellants’ position, the Appellants respectfully traverse the rejection for the following reasons. The Examiner states that because Appellants teach that high Glycemic Index compositions should be avoided due to their negative effect on blood sugar, it is necessarily true that the Product Alert product would also be formulated so as to have a low Glycemic Index in order to avoid these same problems. Appellants respectfully assert that the problem with this theory is that there is absolutely no indication that Product Alert even considers, much less is concerned with, the relation between high Glycemic Index values and negative effects on blood sugar. Without proof that Product Alert was formulated to specifically address this relationship between Glycemic Index and blood sugar, it cannot be concluded that the Product Alert teaches a low Glycemic Index product. Therefore, Appellants respectfully assert that the statement that high Glycemic Index values should be avoided cannot be used as an admission to prove that the cited art inherently has the same Glycemic Index value.

Therefore, for all of these additional reasons, Appellants respectfully request that the rejection under 35 U.S.C. §103 be overturned.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company, assignee of Appellant's entire right, title, and interest in the invention at issue. A copy of this Assignment was recorded at the United States Patent and Trademark Office on August 8, 2002, at reel # 012970, frame # 0431.

RELATED APPEALS AND INTERFERENCES

Appellant, Appellant's undersigned legal representative and the Assignee are not aware of any pending appeals or interferences that would be directly affected by or have a bearing on the Board's decision in the subject Appeal.

STATUS OF CLAIMS

Claims 1-6, 8-11, 13-18 and 20 are the subject of this appeal. No other claims are pending or allowed. Claims 7, 12 and 19 were cancelled during prosecution. Claims 1-6, 8-11, 13-18 and 20 were rejected for the third time in an Office Action dated May 14, 2003. Appellants filed a Notice of Appeal on July 18, 2003, appealing from the third rejection of Claims 1-6, 8-11, 13-18 and 20. An Appeal Brief was filed on September 18, 2003. A Final Office Action was received on December 17, 2003.

Presently, Claims 1-6, 8-11, 13-18 and 20 stand rejected as indefinite under 35 U.S.C. § 112, second paragraph, and as obvious under 35 U.S.C. § 103 (a). The Claims on Appeal are set forth in Appendix A.

STATUS OF AMENDMENTS

No amendments were filed or proposed after the Final Office Action in this case. And it is believed that all previous amendments have been entered and considered.

SUMMARY OF THE INVENTION

The present invention is directed to low Glycemic Index food and beverage compositions that reduce the postprandial rise in blood glucose, and enhance the metabolism in the mammalian system, as well as inhibit the storage of systemic fat. [See page 2, lines 22-24] As an additional benefit, these low Glycemic Index compositions have surprisingly been found to enhance the perceived positive mood and energy in the consumer, without rapid depletions of blood glucose (i.e., mediation of blood glucose) while reducing the insulin response. [See page 2, lines 24-27]

Such mood and energy enhancements are significantly enhanced relative to compositions containing only green tea, or those that exhibit a high Glycemic Index. [See page 2, lines 27-29].

Specifically, the present invention is directed towards a composition suitable for use as a food or beverage comprising: one or more flavanols; one or more bracers; and vitamin B, wherein the composition exhibits a Glycemic Index of about 55 or less, and wherein the composition further comprises from about 0.1% to about 10% total fructose, by weight of the composition. [Claim 1]. Additionally, the present invention encompasses a beverage composition that is a ready-to-drink beverage composition comprising at least about 50% total water, by weight of the composition. [Claim 4]. Moreover the present invention is directed towards a composition comprising: from about 1 milligram to about 200 milligrams of the total flavanol per every 240 milliliters of the composition; and from about 1 milligram to about 200 milligrams of the total bracer per every 240 milliliters of the composition. [Claim 8].

The present invention also teaches a composition comprising: from about 10 milligrams to about 150 milligrams of the total flavanol per every 240 milliliters of the composition; from about 10 milligrams to about 100 milligrams of the total bracer per every 240 milliliters of the composition; and from about 0.3 milligrams to about 0.9 milligram of the vitamin B₆ per every 240 milliliters of the composition wherein the composition exhibits a Glycemic Index of about 35 or less. [Claim 13]. The present composition further comprises a member selected from the group consisting of apple juice, pear juice, agave, and mixtures thereof. [Claim 16]. Furthermore, the present invention relates to a kit comprising: a composition according to Claim 1; and information that use of the composition provides one or more benefits selected from the group consisting of perceived energy, physiological energy, low glycemic benefits, and combinations thereof. [Claim 18]. Finally, the present invention is directed towards a method of enhancing the perceived energy of a mammal comprising orally administering a composition according to Claim 1 to the mammal. [Claim 20].

PREVIOUS ISSUES

Are Claims 1-6, 8-11, 13-18 and 20 indefinite under 35 U.S.C. § 112, second paragraph for “failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention?”

Are Claims 1-6, 8-11, 13-18 and 20 unpatentable under 35 U.S.C. § 103 (a) for being obvious over Product Alert (v.28, no.11) and Appellants’ alleged assertions?

GROUPING OF CLAIMS

Claims 1-6, 8-11, 13-17 (herein "Group A") are directed to the composition and thus, stand or fall together.

Claim 18 (herein "Group B") is directed to a kit, and is therefore, separately patentable.

Claim 20 (herein Group C") is directed to a method, and is therefore separately patentable.

PREVIOUS ARGUMENTS

The Rejection under 35 U.S.C. § 112, second paragraph

A. The Examiner's Previous Rejection

The Examiner has rejected Claims 1-6, 8-11, 13-18 and 20 under 35 U.S.C. § 112, second paragraph as being indefinite for failing to point out and distinctly claim the subject matter which Appellants regard as the invention. Specifically, the Examiner objects to the use of the term "about" in Claim 1, and throughout the claim language. The Examiner argues that the term "about" is a "relative term" that is not defined by the claims. The Examiner continues to state that "the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention." (Page No. 2, Paper No. 14). Appellants respectfully traverse this rejection.

B. The Appellants' Argument

The descriptive term "about" does not generally render a claim indefinite. See W.L. Gore & Assoc. v. Garlock, Inc., 721 F.2d 1540, 1557, 220 USPQ2d 303, 316 (Fed. Cir. 1983). The term "about" entitles the Applicant to a relatively broad interpretation of any range that it modifies that is claimed in the patent. See Syntex (USA) Inc. v. Paragon Optical Inc., 7 USPQ2d 1001, 1038 (D. Ariz. 1987). "About" is not an arbitrary term, but rather, is a clear but flexible word with a meaning similar to "approximately." See Ex parte Eastwood, 163 USPQ 316, 317 (Pat. Off. Bd. App. 1968). As a matter of law, the term "about" is a "clear warning that exactitude is not claimed but rather a contemplated variation." Kolene Corp. v. Motor City Metal Treating, Inc., 307 F. Supp. 1251, 1258, 163 USPQ 214, 220 (E.D. Mich. 1969).

Indefiniteness must be determined by the facts of each case, not by application of an abstract rule. "Patentable inventions cannot always be described in terms of exact measurements, symbols and formula, and the Applicant necessarily must use the meager tools provided by language, tools which admittedly lack exactitude and precision. If the claims, read in light of the specification *reasonably* apprise those skilled in the art both of the utility and scope of the

invention, and if the language is as precise as the subject matter permits, the courts can demand no more.” Georgia Pacific Corp. v. United States Plywood Corp., 258 F.2d 124, 136 (2nd Cir. 1958), *cert. denied*, 358 U.S. 884 (1958).

In view of the foregoing, Appellants respectfully assert that the use of the term “about” in the present claims is sufficiently definite, particularly when properly interpreted with reference to the specification. For example, Appellants respectfully direct the Board to Examples 1 and 2 of the presently identified specification. Both examples set forth working examples of “about” as it applies to the present invention. It is therefore submitted that there is a reasonable standard for ascertaining the intended meaning of the term “about,” although the claims need not be limited by this illustration. Thus, for the foregoing reasons, Appellants respectfully request this rejection be overturned.

The Rejection under 35 U.S.C. § 103 (a)

A. The Examiner’s Previous Rejection and the Referenced Art

The Examiner has rejected Claims 1-6, 8-11, 13-18 and 20 under 35 U.S.C. § 103(a) as being obvious over Product Alert (v. 28, no.11), which discusses Cinagro Energy Plus Healthy Whole Body Tonic, in view of Appellants’ alleged assertions. According to the Examiner, the Product Alert product contains water, agave nectar, lemon, orange and lime juice, soy protein isolate, green tea extract, various vitamins and minerals, in addition to other ingredients. The Examiner also deduces that, because Appellants’ state that high Glycemic Index foods should be avoided, the Product Alert product must, therefore, have the same Glycemic Index value as Appellants’ invention.

The Examiner argues that “because the cited art teaches all the ingredients listed in the claims, it is more than reasonable to assume that it also teaches the Glycemic Index characteristics.” (Page no. 4, Paper No. 10). Additionally, the Examiner argues that because the reference contains agave nectar, which is also preferably utilized in the present invention, the reference composition must have the same Glycemic Index. See Id. Finally, the Examiner argues that, while the Glycemic Index value of the reference is not known, it would have been obvious to optimize this value to those skilled in the art because the Glycemic Index is a “notoriously well-known result effective variable,” and a “high Glycemic Index should be avoided” because it can increase blood glucose levels, which in turn leads to increased insulin levels and fat accumulation. (Page No. 3, Paper No. 14). For the following reasons, Appellants respectfully traverse the rejection under 35 U.S.C. § 103 (a).

B. The Appellants’ Argument

Under existing law, any person who “invents or discovers any new or useful process, machine, manufacture, or composition of matter, or any new useful improvement thereof, may obtain a patent thereof, subject to the conditions and requirements of this title.” 35 U.S.C. §101. Under the various sections of the 1952 Patent Act, as amended and interpreted, the Applicant is *entitled* to a patent unless the Examiner can show, among other things not presently at issue, obviousness.

In particular, the Examiner bears the burden of factually supporting any prima facie conclusion of obviousness. In determining the differences between the cited art and the claims, the question is not whether the differences themselves would have been obvious, but whether the claimed invention as a whole would have been obvious. See Stratoflex, Inc. v. Aeroquip Corp., 713 F.2d 1530 (Fe. Cir. 1983). Distilling the invention down to the “gist” or “thrust” of an invention disregards the requirement of analyzing the subject matter “as a whole.” See W.L. Gore & Assoc., Inc. v. Garlock, Inc., 721 F.2d 1540 (Fed. Cir. 1983). If, viewing the invention as a whole, the Examiner does not produce a prima facie case, the applicant is under no obligation to submit evidence of non-obviousness. See In re Fritch, 972 F.2d 1260 (Fed. Cir. 1992). Inventors of unobvious compositions, such as those of the present invention, enjoy a *presumption* of non-obviousness, which must then be overcome by the Examiner establishing a case of prima facie obviousness by the appropriate standard. If the Examiner does not prove a prima facie case of unpatentability, then without more, the Applicant is entitled to grant of the patent. See In re Oetiker, 977 F.2d 1443.

The Examiner’s generalization that, because the referenced art contains ingredients similar to the present invention, it is more than reasonable to assume that it also possesses similar Glycemic Index characteristics, does not meet the Examiner’s burden of establishing a prima facie case of obviousness. To establish a prima facie case of obviousness under 35 U.S.C. §103, the Examiner must meet three basic criteria. First, there must be some suggestion or motivation, either in the reference itself, or in the knowledge generally available to one of ordinary skill in the art, to modify the reference. Second, there must be a reasonable expectation of success. Finally, the cited reference must teach or suggest *all* the claim limitations. See, for example, In re Vaeck, 947 F.2d 488 (Fed. Cir. 1991). Appellants respectfully assert that the Office Action fails to establish all of these criteria, and thus, fails to make a prima facie case of obviousness under 35 U.S.C. § 103.

1) Group A Claims

First, Appellants respectfully assert that there is no suggestion or motivation, either in the reference itself, or in the knowledge generally available to one of ordinary skill in the art, to

modify the reference teachings. The mere fact that references can be modified does not render the resultant combination obvious unless the cited art also suggests the desirability of the modification. See *In re Mills*, 916 F.2d 680 (Fed. Cir. 1990). Appellants respectfully assert that there is nothing in the cited art that suggests the desirability of modifying the reference to produce the compositions of the present invention. Indeed, the cited art fails to even discuss low Glycemic Index value compositions, produced by limiting the amount of total fructose in the composition, much less disclose the aforementioned surprising benefit associated therewith.

Moreover, in regards to the Examiner's argument that "the Glycemic Index is a notoriously well known result effective variable that would be optimized by those of ordinary skill in the health beverage art," Appellants respectfully assert that there is nothing in the cited art that suggests the desirability of modifying the reference to produce the low Glycemic Index value composition of the present invention. As aforementioned, the cited art fails to even discuss the Glycemic Index of the product, much less disclose compositions formulated according to the present disclosure. Additionally, as stated above, the Examiner asserts that it is "notoriously well-known...that high Glycemic Index [compositions] should be avoided due their problematic effects. Appellants respectfully assert that officially noticed facts may only play a minor role in filling evidentiary gaps and cannot provide the totality of evidence to support a rejection. See *In re Alhert*, 424 F.2d 1088, 1092, 165 USPQ 418, 421 (CCPA 1970). Even if obviousness of the variation is predicated on the level of skill in the art, prior art evidence is needed to show what that level of skill was." See *In re Kaplan*, 789 F.2d 1574, 1580, 229 USPQ 678, 683 (Fed. Cir. 1986). Thus, Appellants respectfully assert that not only did the Examiner exceed the case authority allowing reliance on officially noticed facts, the Examiner also failed to provide any art evidence to show the level of ordinary skill in the "health beverage art."

Furthermore, Appellants respectfully assert that the present invention teaches more than compositions having a low Glycemic Index value. Indeed, the present invention is a precise formulation that, together with the low Glycemic Index value, provides the surprising benefits disclosed herein. There are countless ways to combine the ingredients of the present invention. This, in turn, results in a wide variance in the Glycemic Index value of the resulting compositions. Therefore, it is necessary that there be a teaching or suggestion to motivate one to produce the compositions of the present invention, which have a *low* Glycemic Index value, for simply combining the present ingredients would not necessarily lead to such results. Appellants respectfully assert that there is no mention of the desire to achieve these benefits in the cited art, and thus, it would not be obvious to make the modifications necessary to do so.

Additionally, Appellants respectfully assert that the present situation is analogous to Genus-Species determinations in that the fact that a claimed species or subgenus is encompassed

by a cited art genus is not sufficient by itself to establish a prima facie case of obviousness. See *In re Baird*, 16 F.3d 380, 382, 29 USPQ2d 1550, 1552 (Fed. Cir. 1992). The cited reference, according to the Examiner, teaches beverages containing water, agave nectar, lemon, orange and lime juice, spearmint tea, ginseng extract, green tea extract, yerba mate extract, as well as other additional ingredients, and thus represents the 'genus.' In contrast, the present invention, in addition to the claimed ingredients, also requires a Glycemic Index value of about 55 or less, and from about 0.1 to about 10% total fructose by weight of the composition, thus representing the 'species.' Since, as aforementioned, simply combining the ingredients in the referenced art will not necessarily provide the low Glycemic Index value compositions of the present invention, and since there is no teaching in the cited art that such low Glycemic Index value compositions are desirable, Appellants respectfully assert that there is no motivation in the cited art to modify its teachings.

Therefore, for all of these reasons, Appellants respectfully submit that the cited art does not suggest the desirability of the present composition, such that it would motivate one skilled in the art to modify the cited reference. Therefore, the present invention is not obvious over the cited art.

Second, the art reference does not teach or suggest *all* of the claim limitations of the present invention. Appellants respectfully assert that it is the particular combination of ingredients of the present invention that have surprisingly been found to produce compositions having a low Glycemic Index value that enhances the perceived positive mood and energy in the consumer, without rapid depletions of blood glucose, while reducing the insulin response. In contrast, the cited art fails to even teach a composition having a Glycemic Index of about 55 or less, much less disclose its relevance to the achievement of the surprising benefits.

Additionally, the cited art does not teach the particular amounts of the various ingredients required to produce the surprising benefits of the present invention. Specifically, the cited art fails to teach that, by combining the ingredients in the particular proportions indicated in the present claims, and limiting the total fructose in the composition, the perceived positive mood and energy in the consumer is enhanced without rapid depletions of blood glucose, while simultaneously reducing the insulin response. This surprising benefit can be attributed to the low Glycemic Index value exhibited by the present compositions, which results in part from the low total fructose content.

For example, in the present application, under the section entitled "Enhancement of Perceived Energy," the Appellants describe an analytical method wherein three compositions, including the composition described herein, are tested for their effects on individuals' perceived energy. The test results clearly indicate that the low Glycemic Index value compositions of the

present invention provide and / or maintain mental alertness better relative to the high Glycemic Index value compositions tested. Moreover, Examples 1 and 2 of the present application further support the notion that compositions having a low Glycemic Index value provide the perception of enhanced energy and alertness relative to high Glycemic Index value products. Because the cited art fails to specifically limit the total fructose of the compositions therein, and because the total fructose influences the Glycemic Index value of the composition, the Glycemic Index value claimed herein cannot be said to be taught in the cited art. Thus, the cited art cannot be said to teach *all* of the claim limitations of the present invention. Therefore, for both of these reasons, Appellants respectfully assert that the cited art does not teach all the claim limitations of the present invention.

In conclusion, Appellants respectfully assert that the present invention is not obvious in view of the cited art reference. The present invention is directed to compositions that possess a Glycemic Index of about 55 or less and contain particular amounts of various components. This particular combination, along with the specified amounts of each component, is not disclosed in the cited art, nor would it be obvious, such that the skilled artisan would deduce this combination from the cited art. Therefore, the present invention is not obvious in light of the cited references, and the rejection under 35 U.S.C. § 103 should be overturned.

2) Group B Claim

The Group B Claim is a kit comprising the composition according to Claim 1 and information relating to the benefits thereof. Appellants assert that all of the foregoing arguments relating to the Group A Claims apply equally to the Group B Claim since the Group B Claim depends from Claim 1, a member of the Group A Claims. Additionally, Appellants respectfully assert that the Examiner has failed to establish a prima facie case of obviousness in regards to the Group B Claim for the following reasons.

First, Appellants respectfully assert that there is no motivation for one skilled in the art to modify the reference teachings. The suggestion to modify the teachings, must be found in the cited art, and may not be based on Applicants' disclosure. See *In re Vaeck*, 947 F.2d 488 (Fed. Cir. 1991). Appellants respectfully assert that the Product Alert does not teach or suggest the use of kits to inform consumers of the benefits and uses of the disclosed product. Indeed, Appellants respectfully assert that the Examiner has in fact used the Appellants' own disclosure to find the requisite motivation needed to declare such kits obvious. As this is an improper source for obviousness determination purposes, Appellants respectfully assert that the first requirement for establishing a prima facie case of obviousness has not been satisfied.

Second, the cited art does not teach or suggest *all* the claim limitations. As aforementioned, the cited art fails to teach or suggest the use of kits to inform consumers of any benefits of the disclosed products. As such, Appellants respectfully assert that the requirement that *all* claim limitation must be taught has not been satisfied, and thus the third factor for establishing a prima facie case has not been met in regard to the Group B Claim.

Based upon this absence of “kits” in the cited art, Appellants respectfully assert that the Examiner actually relies on 35 U.S.C. § 112 as the basis of the rejection of the Group B Claim and not 35 U.S.C. § 103. Therefore, Appellants respectfully assert that the rejection under 35 U.S.C. § 103 is improper and must be overturned.

3) Group C Claim

The Group C Claim is a method of enhancing the perceived energy of a mammal comprising orally administering to the mammal a composition according to Claim 1. Appellants assert that all of the foregoing arguments relating to the Group A Claims apply equally to the Group C Claim since the Group C Claim depends from Claim 1, a member of the Group A Claims. Additionally, Appellants respectfully assert that the Examiner has failed to establish a prima facie case of obviousness in regards to the Group C Claim for all of the following reasons.

Specifically, Appellants respectfully assert that there is no motivation for one skilled in the art to modify the reference teachings. Appellants respectfully assert that the Product Alert does not teach or suggest a method of enhancing the perceived energy of a mammal comprising orally administering a composition (according to Claim 1) to the mammal. Indeed, Appellants respectfully assert that the Examiner has in fact used the Appellants’ own disclosure to find the requisite motivation needed to declare such method obvious. As this is an improper source for obviousness determination purposes, Appellants respectfully assert that the first requirement for establishing a prima facie case of obviousness has not been satisfied.

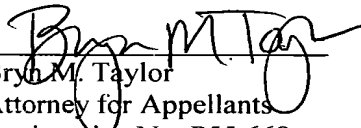
Second, the cited art does not teach or suggest *all* the claim limitations. As aforementioned, the cited art fails to teach or suggest a method of enhancing the perceived energy of a mammal comprising orally administering a composition (according to Claim 1) to the mammal. As such, Appellants respectfully assert that the requirement that *all* claim limitations must be taught has not been satisfied, and thus the third factor for establishing a prima facie case of obviousness has not been met.

Based upon the foregoing, Appellants respectfully assert that the rejection under 35 U.S.C. § 103 is improper and must be overturned in regards to the Group C Claim.

CONCLUSION

It is respectfully submitted that the Examiner's rejection of Claims 1-6, 8-11, 13-18 and 20 under 35 U.S.C. § 112, second paragraph, and 35 U.S.C. § 103(a) is improper. It is therefore respectfully requested that such rejections be overturned.

Respectfully submitted,
For David K. Yang *et al.*

By 
Bryn M. Taylor
Attorney for Appellants
Registration No. P55,668
Telephone: (513) 634-2084

Date: February 26, 2004

Customer No. 27752

APPENDIX A

Claim 1. A composition suitable for use as a food or beverage comprising:

- a) one or more flavanols;
- b) one or more bracers;
- c) vitamin B;

wherein the composition exhibits a Glycemic Index of about 55 or less, and wherein the composition further comprises from about 0.1% to about 10% total fructose, by weight of the composition.

Claim 2. A composition according to Claim 1 comprising green tea, wherein at least one of the bracers is caffeine.

Claim 3. A composition according to Claim 2 which is a beverage composition exhibiting a Glycemic Index of about 45 or less.

Claim 4. A composition according to Claim 3 wherein the beverage composition is a ready-to-drink beverage composition comprising at least about 50% total water, by weight of the composition.

Claim 5. A composition according to Claim 4 comprising less than about 2% of total free sugars selected from the group consisting of glucose, sucrose, maltose, and mixtures thereof.

Claim 6. A composition according to Claim 5 wherein at least one of the flavanols is a catechin.

Claim 7. cancelled

Claim 8. A composition according to Claim 6 comprising:

- a) from about 1 milligram to about 200 milligrams of the total flavanol per every 240 milliliters of the composition; and
- b) from about 1 milligram to about 200 milligrams of the total bracer per every 240 milliliters of the composition.

Claim 9. A composition according to Claim 8 wherein the vitamin B comprises vitamin B₆.

Claim 10. A composition according to Claim 9 further comprising at least one member selected from the group consisting of complex carbohydrates, soluble fibers, and mixtures thereof.

Claim 11. A composition according to Claim 10 wherein the composition comprises from about 0.15 milligrams to about 1.5 milligrams of vitamin B₆, of the vitamin B₆ per every 240 milliliters of the composition.

Claim 12. cancelled

Claim 13. A composition according to Claim 11 comprising:

- a) from about 10 milligrams to about 150 milligrams of the total flavanol per every 240 milliliters of the composition;
- b) from about 10 milligrams to about 100 milligrams of the total bracer per every 240 milliliters of the composition; and
- c) from about 0.3 milligrams to about 0.9 milligram of the vitamin B₆ per every 240 milliliters of the composition

wherein the composition exhibits a Glycemic Index of about 35 or less.

Claim 14. A composition according to Claim 13 wherein the member is selected from the group consisting of maltodextrins, soluble fibers, and mixtures thereof.

Claim 15. A composition according to Claim 14 wherein the composition exhibits a Glycemic Index of less than about 45.

Claim 16. A composition according to Claim 6 comprising a member selected from the group consisting of apple juice, pear juice, agave, and mixtures thereof.

Claim 17. A composition according to Claim 1 comprising agave.

Claim 18. A kit comprising:

- a) a composition according to Claim 1; and

- b) information that use of the composition provides one or more benefits selected from the group consisting of perceived energy, physiological energy, low glycemic benefits, and combinations thereof.

Claim 19. cancelled

Claim 20. A method of enhancing the perceived energy of a mammal comprising orally administering a composition according to Claim 1 to the mammal.